

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JAMES E. COHAN,

Plaintiff(s),

V.

JOSEPH LAMBARDO, et al.,

Defendant(s).

Case No.: 2:17-cv-01651-JCM-NJK

Report and Recommendation

(Docket Nos. 22, 22-1)

Plaintiff is proceeding in this action *pro se* and requested authority pursuant to 28 U.S.C. § 1915 to proceed *in forma pauperis*. Docket No. 4. On October 3, 2017, the Court granted Plaintiff's application to proceed *in forma pauperis*, and screened his complaint pursuant to 28 U.S.C. § 1915. Docket No. 5. The Court identified deficiencies in Plaintiff's complaint, and Plaintiff dismissed his complaint with leave to amend to provide him an opportunity to cure those deficiencies. *Id.* The Court further granted Plaintiff's two motions to extend time to file an amended complaint. Docket Nos. 9, 13.

On February 5, 2018, Plaintiff filed an amended complaint and errata. Docket Nos. 14, 15. The Court identified deficiencies in Plaintiff's amended complaint and errata, and provided him a second opportunity to cure those defects. Docket No. 16. Plaintiff has now filed a motion to stay his requirement to register under sex offender registration law, and a second amended complaint. Docket Nos. 22, 22-1. For the reasons discussed below, the undersigned **RECOMMENDS** that this case be dismissed.

1 **I. Background**

2 Plaintiff contests his arrest by Defendants Sergeant Rick Binyon and Officers Travis
 3 Newcomb and Michael Smith on October 10, 2016, for being a “non[-]compliant sex offender.”
 4 Docket No. 22-1 at 5-6. Plaintiff alleges that he has never been convicted of sexual assault and
 5 that a Las Vegas Metropolitan Police Department [LVMPD] employee entered false information
 6 about his conviction for sexual assault in Arizona on the *lvmpd.com* website. *Id.* at 1, 4. Plaintiff
 7 frames his second amended complaint as an action under 42 U.S.C. § 1983, for violations of his
 8 First, Fifth, and Fourteenth Amendment rights. *Id.* at 4-7.

9 **II. Discussion**

10 As a preliminary matter, Plaintiff filed, concurrently with his second amended complaint,
 11 a motion to stay his requirement to register under the sex offender registration law. Docket No.
 12 22. Plaintiff asks the Court to stay federal law “that ruled that it [is not] unconstitutional to have
 13 sex offenders register.” *Id.* at 2. Plaintiff fails to state to which United States Supreme Court case
 14 or federal rule he is referring. *See generally* Docket No. 22. Moreover, Plaintiff’s motion, even
 15 construed liberally, is inappropriate and moot given the undersigned’s recommendation that this
 16 case be dismissed. *See Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that
 17 documents filed by *pro se* parties must be liberally construed). The Court therefore DENIES
 18 Plaintiff’s motion to stay his requirement to register as a sex offender. Docket No. 22.

19 A. Claim as to the Website Information

20 Plaintiff alleges that Doe Defendant, “who is an employee of [LVMPD’s] identification
 21 [bureau]” entered false information about Plaintiff’s sexual assault conviction in Arizona. Docket
 22 No. 22-1 at 4. Plaintiff further alleges that this act violated his First Amendment right to free
 23 speech, as well as his Fifth and Fourteenth Amendment rights to due process. *Id.* Lastly, Plaintiff
 24 alleges that Defendant Sheriff Joseph Lombardo violated Plaintiff’s civil rights under 42 U.S.C. §
 25 1983, “by failing to properly train Doe [Defendant] in the proce[]ture of entering information onto
 26 the internet by [u]sing a computer....” *Id.* at 6.

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i. Entering the Information on the Website

2 The First Amendment prohibits Congress, in relevant part, from “abridging the freedom of
3 speech.” U.S. CONST. amend. I. The First Amendment is applicable to written or spoken speech,
4 or to expressive conduct. *See e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“The right
5 of freedom of speech and press includes not only the right to utter or to print, but the right to
6 distribute, the right to receive, [and] the right to read...); *Jacobs v. Clark County Sch. Dist.*, 373
7 F. Supp. 2d 1162, 1171 (D. Nev. June 10, 2005) (noting that “the Supreme Court has found that
8 conduct, when mixed with elements of expression, also implicates the First Amendment’s
9 protection...”). To allege a violation of his First Amendment right to free speech, Plaintiff must
10 establish, at the minimum, that he engaged or attempted to engage in some form of protected
11 speech. *See e.g.*, *Scheer v. Kelly*, 81 F.3d 1183, 1187 (9th Cir. 2016) (acknowledging that a law
12 which violates the First Amendment’s protection of freedom of speech is felt “by individual
13 speakers”); *cf. Foster v. Bhambi*, 2012 U.S. Dist. LEXIS 77188, at *13 (E.D. Cal. June 4, 2012)
14 (finding that the *pro se* prisoner proceeding *in forma pauperis* failed to state a claim for violation
15 of his First Amendment right to free speech because he did not allege “that any of the defendants
16 prevented or discouraged him from expressing himself or communication”); *Pinard v. Clatskanie
Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006) (applying the standard for a First Amendment
18 retaliation claim, which requires a plaintiff to show, in part, that he engaged in a constitutionally
19 protected activity).

20 Here, Plaintiff alleges that an LVMPD employee entered false information about his sexual
21 assault conviction in Arizona on the *lvmpd.com* website. Docket No. 22-1 at 4. The Court finds
22 that Plaintiff himself did not engage or attempt to engage in any protected speech or expressive
23 conduct and, therefore, that he fails to state a claim for violation of his First Amendment right to
24 free speech.

25 The Fifth Amendment protects, in relevant part, against violations of an individual's right
26 to due process committed by federal actors. U.S. CONST. amend. V; *see also Bingue v. Prunchak*,
27 512 F.3d 1169, 1174 (9th Cir. 2008) (finding that the Fifth Amendment's due process clause
28 applies only to the federal government); *Foley v. Arstegui*, 2014 U.S. Dist. LEXIS 31317, at *7

1 (D. Nev. Mar. 10, 2014). In this case, Plaintiff fails to allege that Doe Defendant, as an LVMPD
 2 employee, is a federal actor. *See generally* Docket No. 22-1. The Court therefore finds that
 3 Plaintiff fails to state a violation of his Fifth Amendment right to due process.

4 The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty,
 5 or property, without due process of law.” U.S. CONST. amend. XIV, § 1. To allege a violation of
 6 his Fourteenth Amendment right to due process, Plaintiff must first establish the existence of a
 7 life, liberty, or property interest for which the protection is sought. *See Ky. Dept. of Corrections*
 8 *v. Thompson*, 490 U.S. 454, 460 (1989). In addition, Plaintiff must allege that the processes in
 9 place are inadequate. *See Zinermon v. Burch*, 494 U.S. 113, 126 (1990). In this case, the crux of
 10 Plaintiff’s complaint is that information regarding his sexual assault conviction was falsely entered
 11 on the *lvmpd.com* website. Docket No. 22-1 at 3-5. This allegation, now pleaded three times, fails
 12 to provide a sufficient basis from which the Court can determine that a violation of Plaintiff’s
 13 Fourteenth Amendment right to due process is plausible regarding entry of information on a public
 14 website. The Court therefore finds that Plaintiff fails to state a claim for violation of his Fourteenth
 15 Amendment right to due process.

16 Where the identity of a defendant is unknown prior to filing a complaint, the plaintiff
 17 should be given an opportunity through discovery to identify the unknown defendant, “unless it is
 18 clear that discovery would not uncover the [identity], or that the complaint would be dismissed on
 19 other grounds.” *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999); *see also* Docket
 20 No. 16 at 3. Although Plaintiff names the unidentified LVMPD employee in his second amended
 21 complaint as Doe Defendant, because the undersigned recommends that this case be dismissed on
 22 other grounds, Plaintiff will not be given any further opportunities to identify the unknown
 23 defendant.

24 ii. Alleged Failure to Train

25 Plaintiff alleges that Defendant Lombardo is subject to liability under 42 U.S.C. § 1983 for
 26 failing to adequately train Doe Defendant “in the proce[]ture of entering information onto the
 27 internet by [u]sing a computer....” Docket No. 22-1 at 6. “[L]iability under section 1983 arises
 28 only upon a showing of personal participation [in the alleged misconduct] by the defendant.”

1 *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). However, a cause of action may nonetheless
 2 exist under 42 U.S.C. § 1983 if it is alleged that a municipality or municipal officer’s failure to
 3 adequately train or supervise subordinates lead to the deprivation of the plaintiff’s constitutional
 4 rights. *See Aguilar v. Kuloloia*, 2007 U.S. Dist. LEXIS 73332, at *16 (D. Nev. Sept. 28, 2007);
 5 *see also Fixel v. United States*, 737 F.Supp. 593, 598 (D. Nev. 1990).

6 The failure to adequately train must amount to a “deliberate indifference to the rights of
 7 the person with whom the police came into contact.” *City of Canton v. Harris*, 489 U.S. 378, 388
 8 (1989); *see also Gibson v. County of Washoe*, 290 F.3d 1175, 1194 (9th Cir. 2002). A training
 9 policy illustrates deliberate indifference when policymakers continue to adhere “to an approach
 10 that they know or should know has failed to prevent tortious conduct by employees.” *Bird v. Nev.*
 11 *Highway Patrol*, 2017 U.S. Dist. LEXIS 19208, at *10-11 (D. Nev. Jan. 23, 2017) (citing *Long v.*
 12 *County of Los Angeles*, 442 F.3d 1178, 1186 (9th Cir. 2006)); *see also Walls v. Las Vegas Metro.*
 13 *Police Dep’t*, 2013 U.S. Dist. LEXIS 38662, at *7-8 (D. Nev. Mar. 19, 2013) (“Deliberate
 14 indifference occurs when the need for more or different action ‘is so obvious, and the inadequacy
 15 [of the current procedure is] so likely to result in the violation of constitutional rights, that the
 16 policymakers … can reasonably be said to have been deliberately indifferent to the need.’”)
 17 (internal citation omitted).

18 To allege failure to adequately train under 42 U.S.C. § 1983, Plaintiff must first establish
 19 that the training constitutes a widespread policy and is inadequate. *See Bird*, 2017 U.S. Dist.
 20 LEXIS 19208, at * 11. Plaintiff must then establish that the violation or injury would have been
 21 avoided, but for the inadequate training policy. *See id.* In this case, Plaintiff makes a conclusory
 22 allegation that Defendant Lombardo, “being the head of [LVMPD,]” failed to properly train Doe
 23 Defendant to enter information on the *lvmpd.com* website. Docket No. 22-1 at 6-7. Plaintiff fails
 24 to allege, however, that the training policy was widespread, that but for the policy, his
 25 constitutional rights would not have been violated, or that the need to change the training policy is
 26 obvious. The Court therefore finds that Plaintiff fails to state a claim for failure to adequately train
 27 under 42 U.S.C. § 1983.

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1 B. Claim as to Plaintiff's Arrest and Detention

2 Plaintiff alleges that Defendants Binyon, Newcomb, and Smith violated his Fifth and
 3 Fourteenth Amendment rights to due process by removing him from his car, arresting him, and
 4 transporting him to jail. Docket No. 22-1 at 5-7. As discussed in Section II(A)(i), the Fifth
 5 Amendment applies only to federal actors. Plaintiff fails to allege that Defendants Binyon,
 6 Newcomb, and Smith, as LVMPD officers, are federal actors. *See generally* Docket No. 22-1.
 7 The Court therefore finds that Plaintiff fails to state a claim for violation of his Fifth Amendment
 8 right to due process.

9 To allege a deprivation of procedural due process under the Fourteenth Amendment,
 10 Plaintiff must first establish the existence of a life, liberty, or property interest for which the
 11 protection is sought. *See supra*, Section II(A)(i). Plaintiff must then plead that the processes in
 12 place are inadequate. *Id.* The Court finds that Plaintiff fails to make this showing and, therefore,
 13 fails to state a claim for violation of his Fourteenth Amendment right to due process.¹

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21 ¹ Plaintiff cites to *Clanton v. Cooper* in his second amended complaint. Docket No. 22-1
 22 at 7 (129 F.3d 1147 (10th Cir. 1997)). In *Clanton*, the Court compared the transmission of false
 23 information over the National Crime Information Center system, “in order to cause unjustifiedly
 24 [sic] extended incarceration of a suspect,” with the violation of the Fourth Amendment’s warrant
 25 requirement when a false statement is included in an affidavit and relied upon to find probable
 26 cause. 129 F.3d at 1154-56. The Court construes Plaintiff’s citation to *Clanton* to argue that the
 27 holding in *Clanton* applies to the instant case, and warrants a finding that Defendants Binyon,
 28 Newcomb, and Smith violated his Fourteenth Amendment right to due process by arresting him
 because of the allegedly falsely entered information about his sexual assault conviction in Arizona
 on the *lvmpd.com* website. Although various factual parallels exist between the instant case and
Clanton, the Court finds that an extension of the Tenth Circuit’s finding is unwarranted because
 Plaintiff’s second amended complaint does not allege a Fourth Amendment violation and does not
 allege that the allegedly false information on the *lvmpd.com* website lead to his arrest. *See generally* Docket No. 22-1.

1 **III. Conclusion**

2 For the reasons discussed above, the undersigned **RECOMMENDS** that this case be
3 **DISMISSED** without prejudice. The Court further **DENIES** Plaintiff's motion to stay his
4 registration requirement under sex offender law. Docket No. 22.

5 **IT IS SO ORDERED.**

6 Dated: July 9, 2018

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8 NANCY J. KOPPE
9 United States Magistrate Judge

10 **NOTICE**

11 Pursuant to Local Rule IB 3-2 **any objection to this Report and Recommendation must**
12 **be in writing and filed with the Clerk of the Court within 14 days of service of this document.**

13 The Supreme Court has held that the courts of appeal may determine that an appeal has been
14 waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S.
15 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified
16 time and (2) failure to properly address and brief the objectionable issues waives the right to appeal
17 the District Court's order and/or appeal factual issues from the order of the District Court.
18 *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708
19 F.2d 452, 454 (9th Cir. 1983).

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